

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JACK BOCK,

Plaintiff,

v.

Civil Action No. 5:05CV184  
(STAMP)

JO ANNE B. BARNHART,  
Commissioner of Social  
Security Administration,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**GRANTING PLAINTIFF'S MOTION TO DISMISS**

On November 14, 2005, the plaintiff in the above-styled civil action filed a complaint against the Commissioner of Social Security Administration ("Commissioner") appealing a final decision of the Commissioner regarding the plaintiff's claim for disability benefits pursuant to the Social Security Act. On January 17, 2006, the defendant filed an answer to the plaintiff's complaint arguing that the plaintiff was not entitled to disability insurance benefits or supplemental security income and that the Commissioner's findings of fact were supported by substantial evidence. On June 9, 2006, the plaintiff filed a motion to dismiss his complaint. For the reasons stated below, this Court finds that the plaintiff's motion should be granted and that this action should be dismissed with prejudice.

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, a plaintiff has an absolute right to unilaterally dismiss his complaint until an answer or motion for summary judgment has been

filed. Fed. R. Civ. P. 41(a)(1); Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel, 2 F.3d 544, 546 (4th Cir. 1993). However, because the defendant in this action has filed an answer, the plaintiff's right to dismiss is not absolute, but requires the plaintiff to proceed pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. "The decision to grant a voluntary dismissal under Rule 41(a)(2) is a matter for the discretion of the district court, and its order will ordinarily not be reversed except for an abuse of discretion." Davis v. USX Corp., 819 F.2d 1270, 1272 (4th Cir. 1987). Court's in the Fourth Circuit have considered the following elements when determining whether to dismiss the plaintiff's action with or without prejudice:

(1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment is pending.

See e.g. Teck Gen. Partnership v. Crown Cent. Petroleum, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998)(citing unpublished opinion Gross v. Spies, 133 F.3d 914 (4th Cir. 1998)(Table)); Shabazz v. PYA Monarch, LLC, 271 F. Supp. 2d 797, 799 (E.D. Va. 2003)(same). This Court addresses these elements in turn.

While there is no evidence on the record to indicate the opposing parties effort or expenses in preparing for trial,<sup>1</sup> this Court finds that there has been a lack of diligence on the part of

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<sup>1</sup>Indeed, appeals from the Commissioner are resolved on cross-motions for summary judgment.

the plaintiff in this action. Pursuant to Local Rule of General Procedure 83.12, the plaintiff is required to file a brief in support of his claim for relief within thirty days after the defendant has filed an answer and a complete copy of the administrative record. In this action, as stated above, the federal defendant filed an answer and transcript on January 17, 2006, but the plaintiff failed to file a brief in support of his claim within the requisite thirty days. In fact, the plaintiff's motion to dismiss this action was not filed until nearly five months after the defendant had filed an answer. Accordingly, this Court finds the second factor weighs in favor of dismissing with prejudice.

In addition, this Court considers the sufficiency of the explanation provided by the plaintiff with regard to the need for a dismissal. In this action, the plaintiff's motion to dismiss consists of a single sentence: "Plaintiff, by counsel, asks this Court to dismiss the above-styled action." See Pl.'s Mot. to Dismiss at 1. The plaintiff has provided no explanation at all in his motion to dismiss and has failed to provide a memorandum in support of his motion. Accordingly, this Court finds that the third factor weighs in favor of dismissing the plaintiff's complaint with prejudice.<sup>2</sup>

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<sup>2</sup>The fourth factor is not entirely applicable to this action because this is an appeal and any "litigation" has been essentially completed.

Conclusion

For the reasons stated above, the plaintiff's motion to dismiss is hereby GRANTED. However, because the plaintiff has failed to be diligent and has failed to provide a sufficient explanation of the need for dismissal, the plaintiff's complaint is hereby DISMISSED WITH PREJUDICE and this civil action is hereby STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to counsel of record herein.

DATED: June 13, 2006

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE